STATE OF MICHIGAN

COURT OF APPEALS

BOARD OF TRUSTEES OF THE POLICEMEN AND FIREMEN RETIREMENT SYSTEM OF THE CITY OF DETROIT,

Plaintiff-Appellant,

v

GRANT THORNTON, L.L.P., and DOEREN MAYHEW & CO., P.C.,

Defendants-Appellees.

UNPUBLISHED
March 11, 2003

No. 236415
Oakland Circuit Court
LC No. 01-029779-NZ

Before: Meter, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Plaintiff appeals by right from an order granting summary disposition to defendants under MCR 2.116(C)(8). We affirm.

This case arises out of the dissolution and bankruptcy of a mortgage company, MCA Financial Corporation (MCA), in early 1999. Plaintiff, who had lent money to MCA, suffered financial loss upon MCA's collapse. It alleged in its complaint that defendants, two accounting firms who served MCA and its subsidiaries, contributed to this loss by, among other things, "willfully or recklessly misrepresent[ing] the actual financial condition of MCA," thereby fraudulently inducing plaintiff to invest with MCA.

Plaintiff set forth three separate counts in the complaint, labeled "fraud" (Count I), "aiding and abetting fraud" (Count II), and "negligent misrepresentation" (Count III).

Defendant Grant Thornton moved for summary disposition under MCR 2.116(C)(8), arguing, among other things, that (1) dismissal of Count I was warranted by virtue of MCR 2.112(B)(1) because the complaint failed to state the circumstances of the alleged fraud with specificity as required by that court rule, (2) dismissal of Count I was also warranted because plaintiff did not sufficiently allege that Grant Thornton made representations with the intent that plaintiff rely on them, (3) dismissal of Count II was warranted because plaintiff could not show that Grant Thornton provided substantial assistance to MCA in perpetrating fraud, and (4) dismissal of Count III was warranted because the Michigan Accountant Liability Act (MALA), MCL 600.2962, barred the cause of action.

Defendant Doeren Mayhew also filed a motion for summary disposition under MCR 2.116(C)(8), reiterating many of the same arguments made by Grant Thornton but adding that (1) Counts I and II were in actuality claims of professional negligence barred by the MALA and (2) no cause of action for the "aiding and abetting fraud" theory in Count II exists in Michigan.

In responding to defendants' motions, plaintiff argued, among other things, that defendants "falsely represented that they did perform the audit in accordance with [generally accepted auditing standards] when they did not." Plaintiff contended that defendants intended plaintiff to rely on the false representation in that "the primary purpose of an audited financial statement is to provide independent and reliable verification of a company's financial condition to third parties." Plaintiff also argued that its claim for fraud in Count I was sufficiently specific under the standards espoused by *Kassab v Michigan Basic Prop Ins Ass'n,* 441 Mich 433; 491 NW2d 545 (1992). With regard to Count II, plaintiff stated that "[t]he essence of the claim is that the Defendants surrendered their independence and became agents of MCA in perpetrating its fraud on the Plaintiff. . . . Whether one labels this claim aiding and abetting, conspiracy, or silent fraud, Count II does state a claim." With regard to Count III, plaintiffs argued that the MALA did not bar the cause of action alleged because Texas law, which takes a more liberal approach to lawsuits for accountant negligence, was applicable. In support of this argument, plaintiff stated:

> [plaintiff] is bringing this claim as a purchaser and assignee, and common law subrogee of the banks in what has commonly been called the "Bank Group." As set forth in both its own Complaint and in Plaintiff's Complaint, the Bank Group, led by Chase Bank of Texas, W.A., its lead lender[,] loaned money to the MCA entities on the basis of the same audited financial statements provided by [defendants].
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> Plaintiff alleges in paragraphs 74 and 75 that these audited financial statements were received in Texas and relied upon in Texas by the Bank Group in making and continuing loans to MCA. The subject audited financial statements contained misrepresentations and misleading information upon which Chase Bank of Texas relied on behalf of itself and as agent for the other members of the Bank Group to make loans to MCA.

Plaintiff argued that Texas law should apply because "Texas is the place where the Bank Group received the audited financial statements and where they relied upon them."

In reply briefs, defendants argued, among other things, that "[plaintiff's] only allegation of intent to defraud rests on its assertion that the Defendants should have been aware at the time that they issued their audit reports that MCA's lenders might one day review them. An action for fraud, however, requires more." They further argued that Texas law was inapplicable to the case because the parties are Michigan residents and because the injury suffered by plaintiff occurred in Michigan. Defendants also stated that plaintiffs failed to allege a sufficient temporal connection for showing fraud because "Plaintiff's injury did not arise until a year after the accountants completed their work."

During the summary disposition motion hearing, plaintiff's attorney argued that plaintiff had sufficiently pleaded its claims and that many of defendants' arguments would be more appropriate in a motion brought after discovery under MCR 2.116(C)(10).

The trial court ruled for defendants, stating, in part:

> The Plaintiffs have presented no evidence that Defendants made any material representations that resulted in a loss to Plaintiffs.[1] The mere allegation that Defendants made representations about MCA's financial conditions as of January 21, 1998, and that thereafter Plaintiffs entered into financial loan transactions with MCA, is not sufficient to establish fraud. Plaintiffs fail to plead any facts that show there was actual fraud occurring at MCA between 1995 and 1998. Plaintiff also fails to identify any indicia of fraud that Defendants should or could have detected.
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> In addition, Plaintiffs failed to establish any duty owed by Defendants to them. There was no contractual relationship between Plaintiffs and Defendants. Accordingly, the Motions for Summary Disposition must be granted.[2]

On appeal, plaintiff argues that it sufficiently pleaded a case for fraud. We disagree. This Court reviews de novo a trial court's ruling with regard to a summary disposition motion. *Sewell v Southfield Public Schools*, 456 Mich 670, 674; 576 NW2d 153 (1998). Motions brought under MCR 2.116(C)(8) test the legal sufficiency of a claim with regard to the pleadings alone. *Madejski v Kotmar Ltd*, 246 Mich App 441, 443-444; 633 NW2d 429 (2001). "All well-pleaded facts are accepted as true and are construed in the light most favorable to the nonmoving party." *Id*. at 444. "Summary disposition under MCR 2.116(C)(8) is proper 'when the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery.'" *Corley v Detroit Bd of Ed*, 246 Mich App 15, 18; 632 NW2d 147 (2001), quoting *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). Moreover, "mere conclusions, unsupported by allegations of fact, will not suffice to state a cause of action. . . ." *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 263; 532 NW2d 882 (1995). Under MCR 2.112(B)(1), "[i]n allegations of fraud or mistake, the circumstances constituting fraud must be stated with particularity."

The elements of traditional fraud are the following: (1) the defendant made a material representation, (2) that representation was false, (3) the defendant knew that it was false or made it with reckless disregard for its truth or falsity, (4) the defendant intended to make the plaintiff rely on the statement, (5) the plaintiff did rely on the statement, and (6) the plaintiff suffered damages as a result. *M & D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998), modified on other grounds by *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 689-691; 599 NW2d 546 (1999); *Eerdmans v Maki*, 226 Mich App 360, 366; 573 NW2d 329 (1997).

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[1] The court used the plural because it decided a similar case brought by another plaintiff against defendants at the same time it decided the instant case.

[2] The trial court did not explicitly address the issue of Texas law versus Michigan law.

The complaint in this case simply did not plead fraud with the requisite specificity. Indeed, while plaintiff contended in the complaint that defendants misrepresented the financial situation of MCA, the complaint does not sufficiently set forth specific facts showing that defendants knew the financial representations were false or that they intended to make plaintiff rely on the representations. As noted by the Seventh Circuit in *DiLeo v Ernst & Young*, 901 F2d 624, 629 (CA 7, 1990), a case involving a fraud claim against an accounting firm:

> The complaint does not allege that E & W [the accounting firm] had anything to gain from any fraud by Continental Bank [E & W's client]. An accountant's greatest asset is its reputation for honesty, following closely by its reputation for careful work. Fees for two years-worth of audits could not approach the losses that E & W would suffer from a perception that it would muffle a client's fraud. And although the interests of E & W's partners and associates who worked on the Continental audits may have diverged from the firm's, covering up fraud and imposing large damages on the partnership will bring a halt to the most promising career. E & W's partners shared none of the gain from any fraud and were exposed to a large fraction of the loss. It would have been irrational for any of them to have joined cause with Continental.
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> People sometimes act irrationally, but indulging ready inferences of irrationality would too easily allow the inference that ordinary business reverses are fraud. One who believes that another has behaved irrationally has to make a strong case. The complaint does not come close. It does not identify any of E & W's auditors or explain what that person might have to gain from covering up Continental's wrongs. It offers only rote conclusions . . . .
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> Boilerplate . . . does not suffice. . . . What the DiLeos needed to show, if not that E & W has something to gain from deceit, was at least that E & W knew that particular loans had gone bad and could not be collected. [Citations omitted.]

Similarly, plaintiff in the instant case offered merely the "rote conclusion[]" that defendants fraudulently misrepresented the financial position of MCA with the intent that plaintiff would rely on the misrepresentation. Plaintiff's allegations fundamentally sound in negligence, not in fraud. Plaintiff essentially contends that defendants should have discovered MCA's financial troubles and prepared an audit report accordingly.

Plaintiff attempts to overcome this deficiency by stating in its appellate brief:

> Defendants argued that Plaintiff's real claim is that the Defendants negligently or improperly performed their audit work. Defendants misconstrued the nature of the claim against them in that regard. The gist of Plaintiff's claim regarding [the] failure to properly adhere to generally accepted auditing standards is not the fact that Defendants failed to do so, but, rather, they falsely represented that they did perform the audit in accordance with those standards when they did not. By falsely representing to Plaintiff that they conducted the audits in accordance with

> established standards, Defendants induced Plaintiff to rely upon the information contained in the financial statements.

Once again, however, plaintiff does not allege or provide a basis for inferring that defendants intentionally or recklessly misrepresented that they had performed the audit in a professional manner with the intent that plaintiff would rely on the misrepresentation. The reasoning from *DiLeos* applies. Moreover, as noted in *Brownell v Garber,* 199 Mich App 519, 532-533; 503 NW2d 81 (1993), "If a client attempts to characterize a malpractice claim as a fraud or other type of claim, a court will look through the labels placed on the claim and will make its determination on the basis of the substance and not the form." We view plaintiff's focus on defendants' representations about the quality of their work as an attempt to characterize a negligence claim as a fraud claim.

Because plaintiff's fraud claims[3] are not viable, plaintiff's lawsuit is barred by the MALA. See MCL 600.2962. Indeed, this statute allows negligence claims against an accountant to proceed only if certain specified conditions are satisfied, and plaintiff does not satisfy the conditions in the instant case.

Plaintiff additionally argues that "the trial court erred in holding that there must be a contractual relationship between the parties in order for plaintiff to state a claim." However, when read in context, it is clear that in making this statement, the trial court was referring to plaintiff's failure to satisfy the preconditions for a negligence claim under the MALA. Accordingly, no error occurred with regard to the statement.

Finally, plaintiff argues that its negligent misrepresentation claim, while not viable under Michigan law, should be allowed to proceed under Texas law. We disagree. As noted in *Hall v General Motors Corp,* 229 Mich App 580, 585; 582 NW2d 866 (1998):

> In tort cases, Michigan courts use a choice-of-law analysis called "interest analysis" to determine which state's law governs a suit where more than one state's law may be implicated. See *Sutherland v Kennington Truck Service, Ltd,* 454 Mich 274, 278-286; 562 NW2d 466 (1997). Although this balancing approach most frequently favors using the forum's (Michigan's) law, Michigan courts nonetheless use another state's law where the other state has a significant interest and Michigan has only a minimal interest in the matter . . . .

Plaintiff contends that "Texas has a substantial interest in protecting its citizens from being defrauded by out of state defendants" and that Texas law should be applied because "the lead bank of the Bank Group is a Texas bank" and "[t]he conduct complained of [–] delivering false representations for the purpose of inducing the banks to loan money [–] and the reliance on those representations occurred in Texas." However, we note that all of the parties have strong Michigan connections, plaintiff is Michigan-based and administers pensions for Michigan residents, MCA was a Michigan corporation, the audits in question occurred in Michigan, and

[3] Plaintiff does not discuss its claim of "aiding and abetting fraud" separately in its appellate brief. We note, however, that our analysis with regard to the "fraud" claim applies equally to the "aiding and abetting fraud" claim.

Michigan has a specific statute, the MALA, governing the cause of action at issue. We cannot conclude that merely because one involved bank is located in Texas, Texas law should apply. Michigan has much more than "a minimal interest in the matter." *Hall, supra* at 585. Moreover, we note that plaintiff cites no binding authority for its allegation in its appellate brief that "the most important factors" for choice-of-law purposes are "the place where the plaintiff acted in reliance upon the defendant's representations and the place where plaintiff received the representations."[4] We conclude that Texas law was not applicable and that the claim for negligent misrepresentation was barred by the MALA.

Affirmed.

/s/ Patrick M. Meter
/s/ Kathleen Jansen
/s/ Michael J. Talbot

[4] Indeed, plaintiff cites a restatement comment in support of its assertion.